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Deanna Kleinert v. Kimball Elevator Company, a Utah corporation; HRB Company aka The Boyer Company, a Utah corporation; The Boyer Company, a general partnership; 185 South State Associates aka Boyer Foothills Partnership, LTD., a Limited partnership; Boyer-Gardner Properties Partnership, a general partnership; H. roger Boyer, an individual; Kem C. Gardner, an individual and 185 South State Owners' Association, a Utah corporation : Brief of Appellant

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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IN THE UTAH COURT OF APPEALS

DEANNA KLEINERT, Plaintiff and Appellant, vs. KIMBALL ELEVATOR COMPANY, a Utah corporation; HRB COMPANY aka THE BOYER COMPANY, a Utah corporation; THE BOYER COMPANY, a general partnership; 185 SOUTH STATE ASSOCIATES aka BOYER FOOTHILLS PARTNERSHIP, LTD., a limited partnership; BOYER-GARDNER PROPERTIES PARTNERSHIP, a general partnership; H. ROGER BOYER, an individual; KEM C. GARDNER, an individual; and 185 SOUTH STATE OWNERS' ASSOCIATION, a Utah corporation, Defendants and Appellees.	**BRIEF OF APPELLANT** Case No. 920224-CA Priority No. 16

APPEAL FROM FINAL ORDERS OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE DAVID S. YOUNG PRESIDING

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PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of this case contains the names of all parties to the proceedings in the court below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1991).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. Did the trial court correctly conclude that, on the record before it, the defendants were entitled to summary judgment?

Standard of Review: A trial court's grant of summary judgment is reviewed under a "correctness" standard. Daniels v. Deseret Fed. Sav. & Loan Ass'n, 771 P.2d 1100, 1101-02 (Utah Ct. App.), cert. denied, 781 P.2d 878 & 783 P.2d 53 (Utah 1989). The appellate court considers the evidence in the light most favorable to the losing party and will affirm only where it appears that there is no genuine dispute as to any material issues of fact or where, even according to the facts as contended by the losing party, the moving party is entitled to a judgment as a matter of law. Briggs v. Holcomb, 740 P.2d 281, 283 (Utah Ct. App. 1987). Neither the trial court's conclusion that the facts are undisputed nor its legal conclusions based on those facts are accorded any deference. Barlow Soc'y v. Commercial Sec. Bank, 723 P.2d 398, 399 (Utah 1986).

2. Was there sufficient evidence to raise a genuine issue of material fact as to whether the elevator in which the plaintiff was

injured was in a defective condition unreasonably dangerous to the user?

Standard of Review: In determining whether the trial court properly found that there was no genuine issue of material fact, the appellate court views the facts and inferences to be drawn therefrom in the light most favorable to the losing party. Utah State Coalition of Senior Citizens v. Utah Power & Light Co., 776 P.2d 632, 634 (Utah 1989).

3. Was there sufficient evidence to raise a genuine issue of material fact as to whether the defendants had notice of the dangerous condition of the elevators in the building at 185 South State Street?

Standard of Review: In determining whether a genuine issue of material fact exists, the appellate court reviews the facts and the inferences to be drawn from the facts in the light most favorable to the losing party. Utah State Coalition, 776 P.2d at 634.

4. Did the trial court err in denying the plaintiff leave to amend her complaint to add a claim based on the doctrine of res ipsa loquitur?

Standard of Review: The decision to allow an amendment of a pleading is discretionary with the trial court and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant. Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983). An appellate court will find an abuse of discretion

if it is left with a definite and firm conviction, after reviewing the whole record, that the trial court erred, Betz v. Chena Hot Springs Group, 742 P.2d 1346, 1348 (Alaska 1987); if the trial court's exercise of discretion is manifestly unreasonable or based on untenable grounds or untenable reasons, Davis v. Globe Mach. Mfg. Co., 684 P.2d 692, 698 (Wash. 1984); or if the trial court misapplied or ignored recognized legal principles guiding the exercise of its discretion, Franklin v. Bartsas Realty, Inc., 598 P.2d 1147, 1149 (Nev. 1979); In re Estate of Kunzler, 707 P.2d 461, 465 (Idaho Ct. App. 1985). The legal standard guiding the exercise of a trial court's discretion in granting or denying leave to amend is that leave to amend should be "freely given when justice so requires." Utah R. Civ. P. 15(a).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES OR RULES

Utah Rule of Civil Procedure 56(c) is determinative of the first three issues. It provides, in relevant part:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

Utah Rule of Civil Procedure 15(a) is determinative of the fourth issue. That rule provides, in relevant part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served

> or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Court Below.

The plaintiff, Deanna Kleinert, brought this action to recover damages for personal injuries she sustained in an elevator designed, manufactured, installed and maintained by the defendants. Record ("R.") at 1a-6. The plaintiff amended her complaint once with leave of court to add additional defendants. Id. at 136-37, 144-50. The plaintiff then moved for leave to file a second amended complaint to add a cause of action based on the doctrine of res ipsa loquitur. Id. at 242-53. While that motion was pending, defendant Kimball Elevator Company moved for summary judgment on the grounds that the plaintiff could not sustain her burden of proving the allegations of her strict products liability claim. Id. at 268. The trial court granted Kimball's motion for summary judgment and denied the plaintiff's motion for leave to file a second amended complaint. Id. at 377-78. The remaining defendants then moved for summary judgment on the grounds that they had no notice of any dangerous condition of the elevator. Id. at 381-93.

The trial court granted the remaining defendants' motion for summary judgment, id. at 424-25, and this appeal followed.

B. Statement of Facts.

In 1984 the plaintiff worked as a legal secretary for a law firm with offices in the building at 185 South State Street in Salt Lake City. R. at 341. Defendants HRB Company, the Boyer Company, 185 South State Associates, Boyer-Gardner Properties Partnership, H. Roger Boyer, Kem C. Gardner and 185 South State Owners' Association owned and managed the building.[1] Defendant Kimball Elevator Company manufactured, installed and maintained the elevators in the building. R. at 291, 328 & 467.

On April 16, 1984, at about 4:45 p.m., Ms. Kleinert left her work station on the eighth floor of the building and went to the sixth floor to take the mail and some documents to be photocopied. She then got on an elevator to return to the eighth floor. She was the only person on the elevator. The elevator doors closed, and the lights inside the elevator went out. Id. at 342. The elevator was pitch dark except for lights above the doors that indicated the floor. Id. at 343-44. Ms. Kleinert pressed the Open Door button, but the doors would not open. Id. at 344-45. The elevator then moved upward several floors and stopped abruptly, causing the

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[1] For purposes of their motion for summary judgment, these defendants did not dispute the plaintiff's assertion that they owned or managed the common areas of the building, including the elevators. R. at 387.

plaintiff to lose her balance. Id. at 345-46. For the next forty minutes or so, the plaintiff was trapped inside the elevator. The elevator would rise and stop, then fall and stop erratically. Id. at 345-50. During this time Ms. Kleinert became completely disoriented. She tried to brace herself, but the unexpected movement of the elevator caused her to fall, striking her head, arms and legs against the walls, doors and handrail inside the elevator. Id. at 347-48. She tried to use the emergency phone inside the elevator, but it did not work, and, when the elevator moved suddenly downward, she cut her hand on the edge of the phone door. Id. at 348-49. After about forty minutes, the elevator stopped between the fifth and sixth floors. Ms. Kleinert was able to pry open the elevator doors enough to jump to the floor below. Id. at 351-52.

Within minutes after escaping from the elevator, the plaintiff reported the incident to her boss, David Hirschi. Id. at 441-42. She was tousled, distraught and shaking, and she appeared to have been crying. Id. at 442-43. Ms. Kleinert told Mr. Hirschi that she had been caught in the elevator, that it had dropped some floors and that she had been jostled during the experience. Id. at 443.

Ms. Kleinert made a claim for worker's compensation as a result of the incident. Her employer denied her claim, but an administrative law judge found that the plaintiff had sustained

injuries as a result of a compensable industrial accident. Id. at 360.

The plaintiff brought this action alleging that defendant Kimball was strictly liable for the damages she suffered as a result of her experience in the elevator because the elevator was defective and unreasonably dangerous for its expected use. Id. at 146-47. She further alleged that the remaining defendants were liable for failing to repair the elevator before the incident on April 16, 1984, or for failing to warn business invitees, such as the plaintiff, of the dangerous condition of the elevator. Id. at 147-48. The trial court denied her motion for leave to file a second amended complaint to allege res ipsa loquitur and granted the defendants' motions for summary judgment. Id. at 377-78 & 424-25.

SUMMARY OF ARGUMENTS

The trial court erred in granting the defendants summary judgment on the plaintiff's claims for strict products liability and negligence. The plaintiff introduced sufficient evidence from which a jury could infer that the elevator in which she was injured was in a defective condition unreasonably dangerous to the user (point I). The plaintiff also produced sufficient evidence to raise triable issues of fact as to whether the defendants knew or

should have known of the dangerous condition of the elevator and whether they breached any duty they owed the plaintiff (point II).

The trial court also erred in denying the plaintiff leave to amend her complaint to allege a claim based on res ipsa loquitur. Leave to amend should be freely given in the interests of justice. None of the grounds the defendants relied on in opposing the plaintiff's motion for leave to amend justified denying the plaintiff leave to amend. (Point III.)

ARGUMENT

I.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE PLAINTIFF COULD NOT SUPPORT HER PRODUCTS LIABILITY CLAIM AGAINST KIMBALL ELEVATOR COMPANY.

The plaintiff's claim against Kimball Elevator Company was based on the doctrine of strict products liability, which imposes liability on "one who sells any product in a defective condition unreasonably dangerous to the user . . . ." Restatement (Second) of Torts § 402A (adopted in Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979)). Kimball moved for summary judgment on the grounds that the plaintiff could not sustain her burden of proving the allegations of her strict products liability claim because she had not provided competent expert testimony to prove a product defect. R. at 268, 272. The trial court agreed and granted Kimball's motion for summary judgment. Id. at 376-78.

In doing so, the trial court ignored established Utah law governing the grant of summary judgments and imposed a heavier burden on products liability plaintiffs than is required under Utah law.

In reviewing the correctness of a trial court's grant of summary judgment, the appellate court applies the same standard as the trial court. See Barlow Soc'y v. Commercial Sec. Bank, 723 P.2d 398, 399 (Utah 1986). The question is whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Any doubt or uncertainty concerning questions of fact must be resolved in favor of the party opposing the motion, and all reasonable inferences that can fairly be drawn from the evidence must be evaluated in a light most favorable to the opposing party. Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982).

Kimball claimed that the plaintiff had not raised a genuine issue of fact as to whether or not the elevator in which she was trapped was "in a defective condition unreasonably dangerous to the user." A defective condition is "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." Restatement (Second) of Torts § 402A comment g. A defective condition makes a product "unreasonably dangerous" if it is dangerous "to an extent beyond that which would be contemplated by

the ordinary consumer . . . , with the ordinary knowledge common to the community as to its characteristics." Id. comment i. The plaintiff testified that she was trapped inside the elevator for some forty minutes, that the lights inside the elevator went off, that neither the doors nor the emergency telephone worked properly, and that the elevator would rise, stop and fall erratically and abruptly, throwing her against the walls, doors and handrail. Certainly one could reasonably infer from this evidence, evaluated in the light most favorable to the plaintiff, as the trial court was required to evaluate it, that the elevator was in a defective condition unreasonably dangerous to the user. Users of elevators do not contemplate that an elevator will act as the elevator in this case did. They do not expect to be trapped inside the elevator and thrown against its walls, as the plaintiff was. Because the plaintiff's testimony created a genuine issue of material fact as to whether or not the elevator was in a defective condition unreasonably dangerous to the user, the trial court erred in granting Kimball summary judgment.

Kimball argued, however, and the trial court apparently agreed, that, under Utah law, a plaintiff "must either prove the alleged defect with competent expert testimony or be dismissed." R. at 277. Kimball misstated a plaintiff's burden under Utah law. "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary material listed in Rule 56(c),

except the mere pleadings themselves . . . ." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).[2] Rule 56(c) does not require expert testimony. Rather, it allows a party to show that there is a genuine issue of material fact by deposition testimony (among other ways). As shown above, the plaintiff's deposition testimony was enough to raise a genuine issue of material fact as to whether the elevator was "in a defective condition unreasonably dangerous to the user or consumer." None of the law Kimball relied on below required any more.

Kimball first argued that section 78-15-6 of the Utah Code required expert testimony. R. at 277-79. That section states, in relevant part:

> In any action for damages for personal injury . . . allegedly caused by a defect in a product:
>
> > (1) No product shall be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.
> >
> > . . .

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[2] Celotex, of course, dealt with Federal Rule of Civil Procedure 56, not the Utah rule. However, Utah Rule of Civil Procedure 56 is substantially similar in all relevant respects to the federal rule. Accordingly, this court can look to federal courts' interpretation of the federal rule when construing Utah Rule of Civil Procedure 56. See Prowswood, Inc. v. Mountain Fuel Supply Co., 676 P.2d 952, 958 (Utah 1984).

> (3) There is a rebuttable presumption that a product is free from any defect or defective condition where the alleged defect in the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were in conformity with government standards established for that industry which were in existence at the time the plans or designs for the product or the methods and techniques of manufacturing, inspecting and testing the product were adopted.

Utah Code Ann. § 78-15-6 (1987).

Section 78-15-6 was initially enacted in 1977 as part of the Utah Product Liability Act, Utah Code Ann. §§ 78-15-1 et seq. (1977). In Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), the court declared the entire act, including section 78-15-6, invalid since the act's statute of repose, section 78-15-3, was unconstitutional and the remainder of the act was not severable. See 717 P.2d at 686. In 1989, after Ms. Kleinert's experience in the elevator, the legislature reenacted an amended section 78-15-3, without its unconstitutional statute of repose, and provided that the act's other provisions were severable. Since there was no valid section 78-15-6 in 1984, when the plaintiff was injured, section 78-15-6 arguably does not apply in this case. But even if it did apply, it does not require a plaintiff to prove a product defect by expert testimony.

Section 78-15-6 merely requires the plaintiff to prove that the product was in a defective condition when it was sold and

establishes a rebuttable presumption that the elevator was free from any defect or defective condition if it conformed with government standards. The statute is silent as to how the plaintiff must prove a defect or overcome the presumption. Nothing in the statute says that the plaintiff must prove a defect by expert testimony, as Kimball claimed. Moreover, the effect of any presumption was simply to place on the plaintiff the burden of going forward with the evidence or of making a prima facie case. Tuttle v. Pacific Intermountain Express Co., 121 Utah 420, 242 P.2d 764, 769 (1952). The plaintiff met this burden. She introduced evidence--namely her own deposition testimony--from which a jury could have concluded that the elevator was in a defective condition, despite any compliance with government standards. Under these circumstances, any presumption disappeared, id., and it was for the jury to determine whether the plaintiff's evidence was sufficient to prove a product defect.

Kimball also argued that Utah case law required expert testimony in a case such as this. For this argument, Kimball relied on Dowland v. Lyman Products for Shooters, 642 P.2d 380 (Utah 1982), and Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636 (Utah Ct. App. 1988).

In Dowland, the court affirmed a jury verdict in favor of the defendants on a strict products liability claim. The only issue on appeal was whether the trial court should have excluded testimony

by one of the defendant's expert witnesses. 642 P.2d at 380 & 381. The court held that, even if the trial court erred in admitting the testimony, the error was harmless because the other evidence in the case provided the jury with a substantial basis for concluding that the product did not contain an unreasonably dangerous defect. Id. at 381-82. The plaintiff in Dowland produced four expert witnesses and still lost. But the fact that expert testimony may not be enough to convince a jury in a particular case does not mean that expert testimony is always required. If Dowland stands for anything, it is that the issue of product defect is ordinarily for the jury to decide.

Similarly, Reeves does not require expert testimony to prove a product defect. Reeves brought the action after he suffered severe injuries allegedly as a result of taking certain drugs manufactured by the defendants. The trial court granted the defendants' motions for summary judgment on the grounds that, among other things, there was a lack of evidence of causation. On appeal, the court held that there was sufficient evidence in the record, even without opposing affidavits, to raise a genuine issue of material fact as to whether Reeves' injuries were caused by the drugs. In the process, the court held that expert medical testimony was required to establish causation because whether or not the defendants' product could have caused Reeves' injuries was a matter "outside the knowledge and experience of lay people." 764

P.2d at 640. Causation is not the issue in this case. The issue is whether or not the elevator was in a defective condition unreasonably dangerous to the user. That is a matter well within the knowledge and experience of lay people. Lay people, such as jurors, are the average users of elevators and therefore are especially well qualified to decide whether an elevator that acted as the plaintiff claimed the elevator in this case acted can be considered to be in a defective condition, that is, whether it was in "a condition not contemplated by the ultimate" user that made it dangerous "to an extent beyond that contemplated by the ordinary" user. See Restatement (Second) of Torts § 402A & comments g & i. Thus, expert testimony was not required. Cf. Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980) (expert testimony was not necessary to show that a doctor who left a needle in a patient was negligent since "the propriety of the treatment received is within the common knowledge and experience of the layman").

If Reeves is relevant to this case at all, it is because it recognized that summary judgment should not be loosely granted: "In considering a motion for summary judgment, it is not appropriate for a court to weigh the evidence or assess the credibility" of witnesses. 764 P.2d at 639. "[I]t only takes one sworn statement to dispute the averments on the other side of the controversy and create [a genuine issue of material fact]." Id. at 640. The plaintiff's deposition testimony in this case was just such a sworn

statement, which raised genuine issues of material fact precluding summary judgment.

Cases from other jurisdiction support the plaintiff's position that expert testimony was not required for her to get to a jury. In Power v. Otis Elevator Company, 409 So.2d 389 (La. Ct. App. 1982), the plaintiff had fallen down an escalator. She claimed that the escalator had jerked violently, causing her to fall. Her evidence at trial consisted of her own testimony and that of two witnesses. 409 So.2d at 390. The defendant presented testimony from its own mechanics, who testified that there had never been any trouble with the escalator before and that the escalator was constructed in such a way that it would stop if the current were interrupted. The defendant also presented the testimony of an escalator engineer who stated that, in his opinion, it was not possible for the escalator to move as the plaintiff claimed it did. The court held:

> The jury heard all this testimony and necessarily concluded that the escalator did not malfunction and that the plaintiff's fall was more probably due to her failure to take adequate precautions as she rode the escalator. . . . [P]laintiff's evidence was not compelling and the jury had a sufficiency of evidence before it to conclude that the plaintiff did not prove her case of a defect in the escalator. For us to reverse would constitute an invasion of the fact finding function of the jury.

Id. at 391. Although the plaintiff lost in Power, the court recognized that where, as here, the evidence of a malfunction is disputed, it is for the jury to decide whether there was a defect

in the machine. In fact, some courts have held that expert opinion testimony that a product was defective or unreasonably dangerous is inadmissible because it invades the province of the jury. See, e.g., Willoughby v. Safeway Stores, Inc., 198 F.2d 604, 605-06 (D.C. Cir. 1952); Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 840 (Iowa 1978). By taking the issue of product defect away from the jury, the trial court in this case invaded "the fact finding function of the jury." Cf. Power, 409 So.2d at 391.

Finally, Kimball argued below that the public policy underlying products liability in Utah mandated dismissal of the plaintiff's claim. Just the opposite is true.

When Utah first adopted strict products liability, it did so "to insure that the costs of injuries resulting from defective products [would be] borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 156 (Utah 1979) (quoting Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962)). The court noted that strict products liability was created "because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies." Id. at 157 (quoting Daly v. General Motors Corp., 575 P.2d 1162, 1166 (1978)). In other words, strict products liability was meant to protect

consumers and other users of products, like the plaintiff, not manufacturers, like Kimball.

In striking down the former Utah Product Liability Act, the Utah Supreme Court held that the act's statute of repose violated the open court's clause of the Utah Constitution, article I, section 11, which provides that "every person, for an injury done to him . . ., shall have remedy by due course of law . . . ." See Berry v. Beech Aircraft Corp., 717 P.2d 670, 683 (Utah 1985). It is that very right that the trial court's ruling deprived the plaintiff of. If a plaintiff were required to prove a product defect by expert testimony in every case, as Kimball argued and the trial court apparently agreed, product manufacturers would be insulated from liability in many cases. It was because we live in "an increasingly complex and mechanized society," filled with complex machines that we only partially understand, that the doctrine of strict products liability developed. See Hahn, 601 P.2d at 157 (quoting Daly, 575 P.2d at 1166). The trial court's ruling harks back to the time when a manufacturer could place defective products on the market with impunity because it was too difficult for the plaintiff to prove that the manufacturer was negligent. The law has come a long way since that time. Current Utah law did not require the plaintiff to establish a product defect by expert testimony. It was for the jury to decide whether the plaintiff's testimony was sufficient to meet her burden of

establishing a product defect. The trial court erred by taking the plaintiff's case against Kimball away from the jury.

II.

THE TRIAL COURT ERRED IN CONCLUDING THAT THERE WAS NOT A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE DEFENDANTS HAD SUFFICIENT NOTICE OF THE DANGEROUS CONDITION OF THE ELEVATORS.

The remaining defendants, HRB Company, Boyer Company, 185 South State Associates, Boyer-Gardner Properties Partnership, H. Roger Boyer, Kem C. Gardner and 185 South State Owners' Association,[3] moved for summary judgment on the grounds that the plaintiff had no evidence to show that the defendants had notice of the alleged dangerous condition of the elevators in the building at 185 South State and thus had no duty to repair or warn the plaintiff of the dangerous condition.

The Utah Supreme Court has never considered the degree of care that the owner or operator of an automatic passenger elevator owes to a passenger, but most courts that have considered the issue have held the owner or operator of an elevator to the same high standards of care as a common carrier. See, e.g., Cash v. Otis Elevator Co., 684 P.2d 1041, 1043 (Mont. 1984); Smith v. Munger, 532 P.2d 1202, 1204-05 (Okla. Ct. App. 1974), cert. denied (1975). Under Utah law, although a carrier is not an insurer of its

[3] For convenience, the remaining defendants will be referred to collectively as "the defendants."

passengers' safety, it must exercise the utmost care to protect its passengers against accidents. See McMaster v. Salt Lake Transp. Co., 108 Utah 207, 159 P.2d 121, 122 (1945); Christensen v. Oregon Short Line R.R. Co., 35 Utah 137, 148, 99 P. 676 (1909).

Because of the greater duty the owner of an elevator owes its passengers, some courts have held that, where, as here, a passenger, through no fault of her own, is injured when an elevator malfunctions and the occurrence cannot be accounted for without negligence, she has presented sufficient evidence, not only to get by summary judgment, but also to sustain a verdict in her favor. See, e.g., Chapman v. Turnbull Elevator, Inc., 158 S.E.2d 438, 440 (Ga. Ct. App. 1967); Koenig v. 399 Corp., 240 N.E.2d 164, 166-67 (Ill. Ct. App. 1968).

At a minimum, the defendants, as property owners,[4] owed the plaintiff a duty to use reasonable care to make conditions in the building reasonably safe for her. Williams v. Melby, 699 P.2d 723, 726, 727 (Utah 1985). "The care to be exercised in any particular case depends upon the circumstances of that case and on the extent of foreseeable danger involved and must be determined as a question of fact." Id. at 727 (quoting DCR, Inc. v. Peak Alarm Co., 663 P.2d 433, 435 (Utah 1983)). If a reasonably prudent person should

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[4] For purposes of their motion for summary judgment, the defendants conceded that they were the owners and managers of the common areas of the building at 185 South State, including the elevators. R. at 387.

have known or, by the exercise of reasonable care, could have learned that the elevators constituted a dangerous condition, the defendants can be liable for not taking adequate safety precautions. See id. at 728.

The plaintiff presented sufficient facts from which a jury could conclude that a reasonably prudent person should have known or could have learned, by the exercise of reasonable care, that the elevators constituted a dangerous condition and should have taken adequate precautions to prevent someone like the plaintiff from being injured in one of the elevators:[5]

Between January 1, 1983, and April 16, 1984, Kimball employees responded to forty-nine "trouble calls" regarding the elevators at 185 South State, fourteen of which involved persons stuck in the elevators. See R. at 400 ¶ 17.

The plaintiff herself had been stuck in the elevators at 185 South State three or four times before the incident on April 16, 1984. On those occasions, she had notified her employer's personnel manager about the problems, and the personnel manager had indicated that she would contact defendant Boyer Company. See id. at 399 ¶¶ 10-11.

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[5] These facts were set out in the plaintiff's memorandum in opposition to the defendants' motion for summary judgment. See R. at 396 ¶ 7, 397 ¶ 13, 399-401 ¶¶ 10-20. In their reply memorandum, the defendants did not dispute these facts, although they did dispute their significance. See R. at 413-15.

The property manager for the Boyer Company testified that he would be notified of elevator stoppages either by a tenant in the building or by Kimball. See id. at 399-400 ¶ 12.

The property manager for the Boyer Company further testified that he had notice of the elevators breaking down, not working, stopping and catching people inside and not responding to calls or going to the wrong floor. See id. at 396 ¶ 7. The elevators at 185 South State caused him special concern because they had "a higher incidence of elevator malfunctions" than the elevators at other properties he had managed. See id. at 401 ¶ 19.

A Kimball employee testified that he could "document several cases" where people had started an elevator rocking and "trip[ped] it electrically," causing it to go up and down. See R. at 397 ¶ 13 & 333. He further testified that there had been a "common problem" with the elevators at 185 South State in that people would open the panels inside the elevators so that they could bypass switches and get into the workings of the computer that regulated the elevators. It became "such a problem" that Kimball had to put special locks on the panels. See id. at 397 ¶ 13, 401 ¶ 18 & 335.

It was a common joke among those who worked in the building that the elevators were always getting stuck. Lights in the elevators had gone out on other occasions. The plaintiff testified that no one paid much attention to the elevator alarms because "they go off all the time." See id. at 400 ¶¶ 13-15.

The plaintiff's boss testified that, before the accident, he had heard talk around the office that the elevators were not working properly, that the lights would not come on and that the elevators would not stop at a floor. He further testified that people in the building "were generally aware . . . that there was a potential problem" with elevators dropping one or more floors, but he could not say whether they were aware of the potential problem before or after the plaintiff's accident. See id. at 400 ¶ 16, 443-44 & 461.

From all this evidence a jury could reasonably conclude that the defendants had notice of the dangerous condition of the elevator. Cf. Jones v. Otis Elevator Co., 861 F.2d 655, 662 (11th Cir. 1988) (evidence of substantially similar incidents eighteen months before was sufficient for the jury to infer notice). Although the defendants may not have previously known the elevator that injured the plaintiff to act precisely as it did in this case, they were on notice of many of the problems the plaintiff complained of. They knew or should have known of lights in the elevators going out. They knew or should have known that the elevators had a tendency to drop floors and not stop at a floor. They certainly knew that people were frequently stuck in the elevators. And they should have foreseen that a person stuck in the elevator might get injured if the elevator moved suddenly. One could reasonably conclude from all the evidence, taken as a whole,

that the defendants should have reasonably anticipated that one of their elevators would malfunction, injuring the plaintiff.

This is especially true if Utah were to follow "the best reasoned authorities and a majority of them," Smith v. Munger, 532 P.2d at 1205 (quoting Lander v. Hornbeck, 179 P. 21 (Okla. 1918)), which hold an elevator owner to the same high standard as a common carrier. A carrier "is bound to a much longer forecast of the dangers which surround [its passengers] than he is as regards strangers." Giger v. New York, N.H. & H.R. Co., 60 F.2d 63, 64 (2d Cir. 1932) (per L. Hand, J.), quoted with approval in Johnson v. Lewis, 121 Utah 218, 240 P.2d 498, 502 (1952). A carrier is required to exercise "the 'highest human foresight' possible in the circumstances." Id. (citation omitted). In a case such as this, the court is "not therefore to measure what the defendant should have foreseen by ordinary standards; the law imposes on him a meticulous regard for possibilities which should ordinarily be ignored." Id.

The defendants argued below that they had fulfilled whatever duty they had by contracting for regular inspection and maintenance of the elevators. The Eleventh Circuit rejected a similar argument in Jones v. Otis Elevator Co., 861 F.2d 655 (11th Cir. 1988). The court held that the plaintiff's testimony about how the elevator operated, as well as her expert's testimony, although disputed, was sufficient to establish the defendant's negligence in maintaining

the elevator and that it was for the jury to weigh the conflicting evidence and inferences. 861 F.2d at 663. See also McGowan v. Devonshire Hall Apts., 420 A.2d 514, 519 (Pa. Super. 1980) (evidence that the owner provided for regular inspection and service of the elevator and that inspections immediately before and after the accident showed no defect did not justify taking the case from the jury; the jury was free to conclude that the owner had not provided for sufficiently thorough or frequent inspections). An elevator owner has a nondelegable duty to provide for the safety of its passengers. See, e.g., Phegley v. Graham, 215 S.W.2d 499, 503-04 (Mo. 1948). The defendants cannot escape liability simply by showing that they contracted with Kimball to service the elevators. See, e.g., Cash v. Otis Elevator Co., 684 P.2d 1041, 1045-46 (Mont. 1984); Buford v. Chicago Housing Auth., 476 N.E.2d 427, 436 (Ill. App. Ct. 1985) (housing authority could be liable even though an elevator mechanic checked the elevator the day before the accident).

"Summary judgment should be granted with great caution in negligence cases." Williams v. Melby, 699 P.2d 723, 725 (Utah 1985) (citations omitted). Whether the defendants used reasonable care to discover and correct any defect was for the jury to determine.

III.

THE TRIAL COURT ERRED IN DENYING THE PLAINTIFF LEAVE TO AMEND TO ADD A CLAIM FOR RES IPSA LOQUITUR.

The plaintiff moved to amend her complaint to add a claim based on the doctrine of res ipsa loquitur. Kimball opposed her motion on the grounds that res ipsa loquitur cannot apply in a strict products liability action. R. at 269. The remaining defendants opposed the plaintiff's motion on timeliness grounds. Id. at 256-58. The trial court denied the motion. Because the basis for the trial court's ruling is not clear, see id. at 484-87, the plaintiff will address both grounds for opposing the motion.

Kimball argued that, where a plaintiff specifically relies on a theory of strict products liability, she may not rely on res ipsa loquitur but must prove the existence of a product defect by expert testimony. Id. at 285-86. As shown in part I, supra, the plaintiff was not required to prove her strict products liability claim by expert testimony. But regardless of whether expert testimony is required in a strict products liability action, the plaintiff was still entitled to rely on res ipsa loquitur.

A careful reading of the plaintiff's proposed Second Amended Complaint shows that the plaintiff was not trying to assert res ipsa loquitur to prove her strict products liability claim against Kimball. Instead, she wanted to assert a separate claim, based on res ipsa loquitur, against all the defendants. See R. at 250

(Third Claim for Relief). Utah law expressly allows a party to plead claims for relief in the alternative. See Utah R. Civ. P. 8(a); Rosander v. Larsen, 14 Utah 2d 1, 376 P.2d 146, 146 (1962). To get to a jury on a claim of res ipsa loquitur, the plaintiff only had to show that (1) the accident was of a kind that ordinarily would not have happened had the defendants used due care, (2) the instrument or thing causing the injury was at the time of the accident under the management and control of the defendants, and (3) that the accident happened irrespective of any fault on the part of the plaintiff. Dalley v. Utah Valley Regional Medical Center, 791 P.2d 193, 196 (Utah 1990) (citing Moore v. James, 5 Utah 2d 91, 96, 297 P.2d 221, 224 (1956)). To state a claim based on res ipsa loquitur, the plaintiff was not required to allege, much less prove, a product defect--by expert testimony or otherwise.

Kimball tried to use the plaintiff's alternative theories of recovery to suggest that, if the plaintiff was hurt by a product defect, then something other than the defendants' negligence could have caused the accident, which means that the accident was not of a type that ordinarily would not have happened except for someone's negligence. See R. at 285-86. The argument ignores rule 8, which expressly allows a plaintiff to plead inconsistent claims. See Utah R. Civ. P. 8(e)(2). Moreover, the argument misperceives the doctrine of strict products liability. Just because the plaintiff

may have been injured by a defective product does not mean that the defendant was not negligent. Many product defects are the result of someone's negligence, in designing, manufacturing, testing or maintaining the product. The doctrine of strict products liability was only meant to relieve the plaintiff of the burden of proving that a defendant was negligent. It does not mean that the defendant was not in fact negligent. The defendant may or may not have been negligent. The question is simply irrelevant to a strict products liability claim. Thus, the fact that the plaintiff may have been injured by a defective product does not necessarily mean that the accident was not of a type that ordinarily does not occur in the absence of negligence. It simply means that the plaintiff did not have to prove negligence to recover, but she was still entitled to allege negligence and to rely on res ipsa loquitur for an inference of negligence, as an alternative to her strict products liability claim. Whether or not she could actually prove either strict products liability or the elements of res ipsa loquitur at trial was not for the trial court to decide from disputed evidence and on a motion for leave to amend.

Other courts, under similar circumstances, have allowed plaintiffs to proceed against elevator companies under theories of both res ipsa loquitur and strict products liability. See, e.g., Ruiz v. Otis Elevator, 703 P.2d 1247, 1249-51 (Ariz. Ct. App. 1985). Indeed, the Utah Supreme Court has allowed plaintiffs to

rely on res ipsa loquitur in similar cases. See, e.g., Sansone v. J.C. Penney Co., 17 Utah 2d 46, 404 P.2d 248, 249-50 (1965). The plaintiff in Sansone was injured while riding an escalator. "Due to the nature of an escalator it was impossible for the plaintiff to know or to show just what caused her injury." 404 P.2d at 249. The court held that, under the circumstances, the trial court properly submitted the case to the jury on the doctrine of res ipsa loquitur, even though the plaintiff had placed "100% reliance" on the defectiveness of the escalator. See id. at 250 (Henriod, C.J., dissenting). The court stated:

> It is common knowledge that escalators are widely used in public buildings . . . and that thousands of people . . . use them daily without injury. It is certainly not unreasonable for one to assume that it is safe to use them in the manner and for the purpose for which they were intended. Nor does it depart from reason to draw the inference that if an escalator is so used and an injury occurs there was something wrong in either the construction, maintenance, or operation of the escalator.

404 P.2d at 249-50 (footnotes omitted).

What the court said of escalators in Sansone is equally true of elevators. Thus, the plaintiff's allegations were sufficient to state a claim under Utah law based on res ipsa loquitur.[6]

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[6] For other cases allowing the plaintiff to rely on res ipsa loquitur under facts similar to those in Sansone or in this case, see Londono v. Washington Metro. Area Transit Auth., 766 F.2d 569 (D.C. Cir. 1985); Simmons v. City Store Co., 412 F.2d 897 (5th Cir. 1969) (applying Alabama law); Otis Elevator Co. v. Seale, 334 F.2d 928 (5th Cir. 1964) (applying Louisiana law); Otis Elevator Co. v. Henderson, 514 A.2d 784 (D.C. 1986); Ferguson v. Westinghouse Elec. Corp., 408 So.2d 659, 660-61 (Fla. Dist. Ct. App. 1981), petition

The remaining defendants opposed the plaintiff's motion for leave to amend on the grounds that the motion was filed some six and one-half years after the accident, two and one-half years after the action was filed, and after substantial discovery had been completed. They also complained that any new claims the plaintiff sought to assert would be barred by the statute of limitations and that the proposed amended complaint raised new issues of fact. See R. at 257. These objections did not justify the trial court in denying the plaintiff's motion for leave to amend any more than Kimball's objection did.

Although the timeliness of a motion to amend is one factor Utah courts consider in determining whether the motion should have been granted, the cases in which motions to amend were held to have been untimely have generally involved motions made on the eve of trial. See, e.g., Staker v. Huntington Cleveland Irrigation Co., 664 P.2d 1188, 1189-90 (Utah 1983) (motion made the day of trial); Westley v. Farmer's Ins. Exch., 663 P.2d 93, 94 (Utah 1983) (amendment "would certainly have delayed the trial"); Girard v.

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denied, 418 So.2d 1281 (Fla. 1982); Commercial Union Ins. Co. v. Street, 327 So.2d 113 (Fla. Dist. Ct. App. 1976); Otis Elevator Co. v. Reid, 706 P.2d 1378, 1380 (Nev. 1985); Burgess v. Otis Elevator Co., 495 N.Y.S.2d 376, 379 (App. Div. 1985), aff'd, 503 N.E.2d 692 (N.Y. 1986); Weeden v. Armor Elevator Co., 468 N.Y.S.2d 898 (1983); Mallor v. Wolk Properties, Inc., 311 N.Y.S.2d 141, 144 (1969); Carney v. Otis Elevator Co., 536 A.2d 804, 807 (Pa. Super. 1988); McGowan v. Devonshire Hall Apartments, 420 A.2d 514, 518-19 (Pa. Super. 1980); Bond v. Otis Elevator Co., 388 S.W.2d 681 (Tex. 1965).

Appleby, 660 P.2d 245, 248 (Utah 1983) (motion made the day of trial); Hein's Turkey Hatcheries, Inc. v. Nephi Processing Plant, Inc., 24 Utah 2d 271, 470 P.2d 257, 257 (1970) (amended answer presented for the first time at trial); Chadwick v. Nielsen, 763 P.2d 817, 820 (Utah Ct. App. 1988) (motion made the morning of trial); Tripp v. Vaughn, 746 P.2d 794, 797-98 (Utah Ct. App. 1987) (motion made two weeks before trial). Where an amendment would not delay trial, courts have generally allowed the amendment, even where the amendment added an issue specifically excluded as a trial issue by the pretrial order. See, e.g., Lewis v. Moultree, 627 P.2d 94, 97-98 (Utah 1981); Gillman v. Hansen, 26 Utah 2d 165, 486 P.2d 1045, 1046 (1971) ("The rule in this state has always been to allow amendments freely where justice requires, and especially is this true before trial") (footnote omitted). The primary considerations in considering a motion to amend are whether the parties have adequate notice to meet new issues and whether any party receives an unfair advantage or disadvantage. Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1359-60 (Utah Ct. App.), cert. denied, 795 P.2d 1138 (Utah 1990). The timeliness of a motion to amend is important only where one party is disadvantaged by the motion, such as where the party does not have an adequate opportunity to prepare its defense.

Here, the defendants would not have been unfairly disadvantaged if the plaintiff had been allowed to amend her

complaint to allege res ipsa loquitur. No trial date had yet been set. In fact, discovery was still ongoing, and the proposed amendment would not have necessitated much further discovery, if any. The only new issue raised by the proposed amendment that the defendants identified was whether the elevator was under the exclusive control and management of the defendants, see R. at 257, a matter clearly within their knowledge. Under such circumstances, Utah courts freely allow amendments to the pleadings. See, e.g., Thomas J. Peck & Sons, Inc. v. Lee Rock Prods., Inc., 30 Utah 2d 187, 515 P.2d 446, 449-50 (1973); Gillman, 486 P.2d at 1046, 1047; Hancock v. Luke, 46 Utah 26, 35-38, 148 P. 452 (1915).

Moreover, the fact that the motion was made after the statute of limitations would otherwise have run on the claim did not justify denying the motion. Utah Rule of Civil Procedure 15(c) expressly provides for the relation back of claims made in an amended pleading. Thus, amendments are generally allowed even though, but for the right to amend, the statute of limitations would have run. Meyers v. Interwest Corp., 632 P.2d 879, 882 (Utah 1981).

Finally, the plaintiff could have relied on a theory of res ipsa loquitur if the evidence at trial established the elements of such a claim, even if she had not pled res ipsa loquitur. See Loos v. Mountain Fuel Supply Co., 99 Utah 496, 108 P.2d 254, 258-59 (1940) (remanding to allow amendment of the pleadings to allege res

ipsa loquitur where the evidence at trial supported application of the doctrine but did not support the specific claims of negligence alleged and on which a verdict for the plaintiff was based). Thus, the defendants could not have been prejudiced by an amendment to allege res ipsa loquitur before trial.

Leave to amend a complaint must "be freely given when justice so requires." Utah R. Civ. P. 15(a). If the underlying facts or circumstances the plaintiff relies on may be a proper subject of relief, she ought to be given an opportunity to amend to test her claim on the merits. Foman v. Davis, 371 U.S. 178, 182 (1962). Although the grant or denial of leave to amend is within the trial court's discretion, the trial court must justify its refusal to permit an amendment. Id; Ondis v. Barrows, 538 F.2d 904, 909 (1st Cir. 1976). None of the reasons the defendants asserted justified the trial court in denying the plaintiff leave to amend her complaint to add a claim based on res ipsa loquitur. Therefore, the trial court abused its discretion in denying the plaintiff's motion for leave to amend.

CONCLUSION

The plaintiff presented sufficient evidence to raise triable issues of fact as to whether the elevator that injured her was in a defective condition unreasonably dangerous to the user, whether the defendants owed the plaintiff a duty of care and, if so,

whether they breached that duty. The trial court therefore erred in granting the defendants' motions for summary judgment. Moreover, the evidence was sufficient to allow a jury to infer negligence under the doctrine of res ipsa loquitur. The trial court abused its discretion in denying the plaintiff leave to amend to assert such a claim. The orders of the trial court granting the defendants summary judgment and denying the plaintiff leave to amend should therefore be reversed.

DATED this 8th day of May, 1992.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the above and foregoing Brief of Appellant was mailed, postage prepaid thereon this 8th day of May, 1992, to:

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